

(ii) *When permitted.* To protect a person subject to or otherwise affected by a subpoena, the judge may, on motion, quash or modify the subpoena if it requires:

(A) Disclosing a trade secret or other confidential research, development, or commercial information;

(B) Disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(C) A person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend the formal hearing.

(iii) *Specifying conditions as an alternative.* In the circumstances described in paragraph (c)(3)(ii) of this section, the judge may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(A) Shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(B) Ensures that the subpoenaed person will be reasonably compensated.

(d) *Duties in responding to a subpoena—(1) Producing documents or electronically stored information.* These procedures apply to producing documents or electronically stored information:

(i) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(ii) *Form for producing electronically stored information not specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(iii) *Electronically stored information produced in only one form.* The person responding need not produce the same electronically stored information in more than one form.

(iv) *Inaccessible electronically stored information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably

accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the judge may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of § 18.51(b)(4)(iii). The judge may specify conditions for the discovery.

(2) *Claiming privilege or protection—(i) Information withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as hearing-preparation material must:

(A) Expressly make the claim; and

(B) Describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(ii) *Information produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as hearing-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the judge *in camera* for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) *Failure to obey.* When a person fails to obey a subpoena, the party adversely affected by the failure may, when authorized by statute or by law, apply to the appropriate district court to enforce the subpoena.

§ 18.57 Failure to make disclosures or to cooperate in discovery; sanctions.

(a) *Motion for an order compelling disclosure or discovery—(1) In general.* On notice to other parties and all affected

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persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without the judge's action.

(2) *Specific motions*—(i) *To compel disclosure*. If a party fails to make a disclosure required by § 18.50(c), any other party may move to compel disclosure and for appropriate sanctions.

(ii) *To compel a discovery response*. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(A) A deponent fails to answer a question asked under §§ 18.64 and 18.65;

(B) A corporation or other entity fails to make a designation under §§ 18.64(b)(6) and 18.65(a)(4);

(C) A party fails to answer an interrogatory submitted under § 18.60; or

(D) A party fails to respond that inspection will be permitted—or fails to permit inspection—as requested under § 18.61.

(iii) *Related to a deposition*. When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(3) *Evasive or incomplete disclosure, answer, or response*. For purposes of paragraph (a) of this section, an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(b) *Failure to comply with a judge's order*—(1) *For not obeying a discovery order*. If a party or a party's officer, director, or managing agent—or a witness designated under §§ 18.64(b)(6) and 18.65(a)(4)—fails to obey an order to provide or permit discovery, including an order under § 18.50(b) or paragraph (a) of this section, the judge may issue further just orders. They may include the following:

(i) Directing that the matters embraced in the order or other designated facts be taken as established for purposes of the proceeding, as the prevailing party claims;

(ii) Prohibiting the disobedient party from supporting or opposing designated

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claims or defenses, or from introducing designated matters in evidence;

(iii) Striking claims or defenses in whole or in part;

(iv) Staying further proceedings until the order is obeyed;

(v) Dismissing the proceeding in whole or in part; or

(vi) Rendering a default decision and order against the disobedient party;

(2) *For not producing a person for examination*. If a party fails to comply with an order under § 18.62 requiring it to produce another person for examination, the judge may issue any of the orders listed in paragraph (b)(1) of this section, unless the disobedient party shows that it cannot produce the other person.

(c) *Failure to disclose, to supplement an earlier response, or to admit*. If a party fails to provide information or identify a witness as required by §§ 18.50(c) and 18.53, or if a party fails to admit what is requested under § 18.63(a) and the requesting party later proves a document to be genuine or the matter true, the party is not allowed to use that information or witness to supply evidence on a motion or at a hearing, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the judge, on motion and after giving an opportunity to be heard may impose other appropriate sanctions, including any of the orders listed in paragraph (b)(1) of this section.

(d) *Party's failure to attend its own deposition, serve answers to interrogatories, or respond to a request for inspection*—(1) *In general*—(i) *Motion; grounds for sanctions*. The judge may, on motion, order sanctions if:

(A) A party or a party's officer, director, or managing agent—or a person designated under §§ 18.64(b)(6) and 18.65(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or

(B) A party, after being properly served with interrogatories under § 18.60 or a request for inspection under § 18.61, fails to serve its answers, objections, or written response.

(ii) *Certification*. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party

failing to act in an effort to obtain the answer or response without the judge's action.

(2) *Unacceptable excuse for failing to act.* A failure described in paragraph (d)(1)(i) of this section is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under § 18.52(a).

(3) *Types of sanctions.* Sanctions may include any of the orders listed in paragraph (b)(1) of this section.

(e) *Failure to provide electronically stored information.* Absent exceptional circumstances, a judge may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(f) *Procedure.* A judge may impose sanctions under this section upon:

(1) A separately filed motion; or

(2) Notice from the judge followed by a reasonable opportunity to be heard.

TYPES OF DISCOVERY

§ 18.60 Interrogatories to parties.

(a) *In general*—(1) *Number.* Unless otherwise stipulated or ordered by the judge, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with § 18.51.

(2) *Scope.* An interrogatory may relate to any matter that may be inquired into under § 18.51. An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the judge may order that the interrogatory need not be answered until designated discovery is complete, or until a prehearing conference or some other time.

(b) *Answers and objections*—(1) *Responding party.* The interrogatories must be answered:

(i) By the party to whom they are directed; or

(ii) If that party is a public or private corporation, a partnership, an association, or a governmental agency, by any

officer or agent, who must furnish the information available to the party.

(2) *Time to respond.* The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under § 18.54 or be ordered by the judge.

(3) *Answering each interrogatory.* Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(4) *Objections.* The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the judge, for good cause, excuses the failure.

(5) *Signature.* The person who makes the answers must sign them, and the attorney or non-attorney representative who objects must sign any objections.

(c) *Use.* An answer to an interrogatory may be used to the extent allowed by the applicable rules of evidence.

(d) *Option to produce business records.* If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) Specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) Giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

§ 18.61 Producing documents, electronically stored information, and tangible things, or entering onto land, for inspection and other purposes.

(a) *In general.* A party may serve on any other party a request within the scope of § 18.51:

(1) To produce and permit the requesting party or its representative to